

## BRIEFING NOTE: ASSET RECOVERY

**Ask 12:** Calling on States Parties to deny safe haven to proceeds of corruption by introducing legal frameworks enabling them to take legal action in the absence of a request from another country.

**Ask 13:** Referring to UNCAC Articles 35, 53 (b) and 57 (3) (c), calling on States Parties to recognise the damage caused by corruption and to ensure compensation to states harmed by it. Further referring to UNCAC Articles 53 and 56, calling on States Parties to facilitate the direct recovery of property by notifying affected states of their right to claim for damages or ownership as part of any corruption-related legal proceedings or settlements.

**Ask 14:** Reminding States Parties that asset recovery can serve as an important source of financing for development and mandating international organisations such as the Stolen Assets Recovery initiative (StAR) to work with States Parties to help ensure that the return of assets pursuant to Article 57 and their subsequent use are managed in a transparent and accountable manner in line with Article 9 of the convention.

**Ask 15:** Referring to UNCAC Articles 53-57 and Resolution 4/4, calling on States Parties to mandate the United Nations Office on Drugs and Crime (UNODC) and StAR to complete guidelines relating to the issues in points 12-14 above by the time of the 6th Conference of States Parties, at the latest.

### I. What is the problem or issue? Why is a renewed commitment to asset recovery needed?

Of the hundreds of billions of dollars illicitly acquired by corrupt officials over the course of the last 15 years, no more than US\$5 billion has been recovered and even less returned to the countries from which they were taken.<sup>1</sup> Additionally, countries harmed by corruption are barely compensated as part of corruption-related proceedings or settlements.

In addition to helping countries to recover assets stolen and mitigate the harm caused by corruption, asset recovery has a powerful deterrent effect. It has a key role to play in altering “the equation of ‘risk versus reward’ that lies at the heart of many calculations when it comes to deciding whether or not to engage in corruption”.<sup>2</sup> Indeed, if asset recovery is rendered more likely, public officers will be less tempted to engage in corruption.

The reasons for the failure of asset recovery processes are multiple and can be addressed within the framework of the UN Convention against Corruption (UNCAC). Many of the reasons are outlined in the 2011 report of the Stolen Asset Recovery Initiative entitled “Barriers to Asset Recovery”. The Coalition has identified several priority areas that deserve the attention of the UNCAC Conference of States Parties.

Some of the Coalition proposals relate to the need to deny a safe haven to the proceeds of corruption that is referenced in Coalition Ask 12, above. These correspond to some of the barriers identified by StAR:

- Barrier 10: No quick freeze or restraint mechanisms;
- Barrier 15: Lack of non-conviction based confiscation mechanism.

The Coalition believes that these barriers deserve priority attention.

<sup>1</sup> *Stolen Asset Recovery: Toward a Global Architecture for Asset Recovery*, the World Bank and the UNODC (2008).

<sup>2</sup> Jayawickrama, Pope and Stolpe, *Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof*, *Forum on Crime and Society*, Vol. 2, No. 1. (2002).

Furthermore, in its upcoming report on settlements in foreign bribery cases, StAR has found that countries harmed are rarely compensated. This is covered in Coalition Ask 13.

As to Ask 14, it is well-known that with the few assets returned, this is often done in secrecy. There are doubts about the conformity with UNCAC Article 9, calling for transparency and accountability in the management of public finances.

Finally, in each of the foregoing areas there is a lack of adequate guidance material for countries, hence the proposed Ask 15.

## **II. What does the convention say about asset recovery?**

The UNCAC, adopted in 2003, embodied an international consensus to recover and repatriate the proceeds of corruption: the "return of assets" is identified as "a fundamental principle" of the convention (UNCAC Article 51). Chapter V of the UNCAC lays out a comprehensive legal framework to support international asset recovery.

It includes provisions on international cooperation for purposes of confiscation (UNCAC Articles 54 and 55). International cooperation is essential to asset recovery: when stolen assets are hidden abroad, the whole recovery process depends heavily on effective cooperation between the authorities in the victim and the recipient countries in order to trace the assets and to gather evidence for trial, to secure the assets by implementing provisional measures, to confiscate the proceeds of corruption and eventually to organize their return to the victim country. For example, much of the success in the Abacha case - in which nearly US\$ 2.3 billion were recovered - is to be found in the effective international cooperation of prosecutors, examining magistrates, and police in several jurisdictions, including Nigeria. However, there are still too many examples where cooperation is constrained either by the failures to comply with the prerequisites that apply in the area of mutual legal assistance (MLA) or, most troublesome, due to lack of political will.

The convention further provides for the direct recovery of property through the use of civil proceedings – title/ownership claims and claims for damages (UNCAC Article 53). However, this provision has yet to be fully implemented.

Last but not least, the convention includes provisions on the return of assets (Article 57). However, the UNCAC Coalition regrets that no reference is made about transparency and accountability although it is clear from past asset recovery cases that such principals are critical to the credibility of the whole recovery process.

## **III. How can the issue be addressed?**

To challenge the current status quo and to live up to UNCAC Article 51, States Parties should:

- (1) Deny safe haven to proceeds of corruption by introducing legal frameworks enabling countries receiving assets to take legal action in the absence of a request from another country.**

Currently most states wait for a request before opening proceedings relevant for asset recovery. But they could be more proactive. Whenever they receive credible information linking a corrupt official and his/her assets to their jurisdiction – through suspicious transaction reports, media reports, whistleblowers or any other valuable means – recipient states could potentially open their own investigations and proceedings, either criminal proceedings<sup>3</sup> or, if available, non-conviction based confiscation proceedings. But how often

---

<sup>3</sup> Criminal proceedings usually involve money laundering, but depending on each legal system, they may also involve receiving, illicit enrichment or criminal organisation.

does this actually occur? For example, only when the governments of ex-Presidents Mubarak of Egypt, Ben Ali of Tunisia and Gaddafi of Libya began to collapse did recipient states heed calls to freeze and investigate their assets. One may wonder why no enforcement action was taken before.

Some States might argue that it is not feasible to investigate and pursue asset recovery cases when judicial cooperation is lacking on the part of the victim state. There is no doubt that asset recovery is made even more complex under this scenario. However, past experience has shown that such cases can be pursued provided that legal tools are in place.

This is further confirmed by a recent joint publication from the World Bank and the Organisation for Economic Co-operation and Development (OECD) which indicates that “[donor] countries with successful returns have been proactive in initiating domestic cases”. In other words, rather than waiting for a request for mutual legal assistance to arrive, these countries have initiated their own cases.<sup>4</sup> Examples include Australia, Switzerland, the United Kingdom and the United States.

States Parties should enact and implement legal frameworks so that they are able to take proactive enforcement action whenever there is credible information that assets located within their jurisdiction may be the proceeds of corrupt activities.

This should include the following measures to ease the prosecution’s burden of proof:

- Expanding the scope of the money laundering offence by recognising the widest range of predicate offences and adopting a conduct-based approach when assessing the dual criminality requirement. This is in line with UNCAC Articles 23 (2).
- Allowing confiscation of property defined as “illegal” without requiring prior criminal conviction of the offender. The introduction of such measures – which is in line with UNCAC Article 54 (1) (c) – is crucial to overcome the difficulty of getting a criminal conviction in asset recovery cases.<sup>5</sup> Various non-conviction based confiscation tools may be introduced.<sup>6</sup>

---

<sup>4</sup> Tracking Anti-Corruption and Asset Recovery Commitments: A Progress Report and Recommendations for Action: the StAR Initiative and the OECD (2011).

<sup>5</sup> Criminal confiscation usually takes place as part of sentencing following conviction at trial. In other words, assets can only be confiscated provided that prosecuting authorities manage to prove – according to the high standard of proof that applies in criminal proceedings – that the assets are the proceeds of the criminal offences for which the defendant was duly convicted. Establishing these predicate offences and getting the offender convicted is particularly tough in asset recovery cases due to the clandestine nature of corruption offences. In many instances, the witnesses are at the same time participants in the corrupt act and there is no individual victim to complain. It is even more complicated in cases where, as a result of the passage of time, statutes of limitation reduce the possible avenues for prosecution, while supporting evidence may not be available any more (if available at all) and potential witnesses may have passed away. In addition to these proof challenges, it is worthwhile noting that no criminal prosecution is possible against a deceased person and that immunity rules apply strictly in criminal proceedings. These are strong barriers to asset recovery.

<sup>6</sup> These include the following two: (1) Confiscation of assets belonging to a person associated with a criminal organisation. (This implies the introduction of an offence of “participation with a criminal organisation”) Under this approach, prosecuting authorities have to prove the link between the defendant and the criminal organisation, but it is not necessary to prove that the person or organisation in question committed a specific offence, or that the assets are derived from a criminal offence (i.e. their origin is presumed to be unlawful because they are at the disposal of the criminal organization). This confiscation procedure is available in Switzerland, where it has backed up major successful asset recovery cases. In particular, the Swiss Supreme Court ruled on 7 February 2005 that “the structure set up by Sani Abacha and his accomplices constitutes a criminal organisation since its object was to embezzle funds from the Central Bank of Nigeria for private purposes, and to profit from corrupt transactions” (par. 9.1). As the Abacha family did not even attempt to reverse the presumption, all their assets in Switzerland – a total of US\$508 million – were confiscated and repatriated to Nigeria. (2) Civil forfeiture of tainted assets. Under this approach, the action is brought against the property itself and the only requirement is to prove that it is either an instrument of criminal activity or the proceeds of a crime. Civil recovery offers several advantages, as it is available in situations where criminal confiscation is not<sup>6</sup> and applies a lower standard of proof. This confiscation tool has been recently used by the US Department of Justice in relation to assets that Mr. Nguema Obiang – government minister and son of the president of oil-rich Equatorial Guinea – has amassed in the United States. United States Department of Justice, “Department of Justice Seeks to Recover More Than \$70.8 Million in Proceeds of Corruption from

- Introducing presumptions requiring the defendant to demonstrate the lawful origin of the assets where there is a significant discrepancy between his wealth and his official sources of income which is likely to be associated with corruption. This is envisaged under UNCAC Article 31 (8).

**(2) Recognise the damage caused by corruption and ensure compensation to states harmed.**

Corruption is not only a criminal offence. It is also a tort that harms society as a whole and ought to be compensated to that country's state. This is recognised in UNCAC Articles 53 (b) and 57 (3) (c), which make compensation a part of the asset recovery framework. In practice, however, victim states are rarely compensated for the harm caused by corruption. This is especially true when dealing with foreign bribery cases. Harmed states receive little or no compensation as part of proceedings or settlement processes.

States Parties should ensure proper compensation to harmed states by reaffirming that asset return as envisioned by UNCAC article 51 is not limited to actual stolen/embezzled property but includes damages resulting from an act of corruption: both are assets to be returned.

Naturally harmed states should also pursue their own remedies domestically and should also be attentive to public information about foreign proceedings relating to bribery in their state,

**(3) Facilitate the direct recovery of property by notifying affected states of their right to claim for damages or ownership as part of any corruption-related legal proceedings or settlements. Or more generally, there should be systematic information exchange**

The right to bring civil claims (as provided by UNCAC Article 53) is of no use if countries are not aware of the existence of legal proceedings and settlements abroad and, as a consequence, are not in a position to take action towards the direct recovery of property. And yet, in practice, information about proceedings and settlements is often not easily accessible to enforcement authorities in other countries.

States Parties should be called upon to inform each other in a timely manner of the existence of any corruption-related legal proceedings or settlements States Parties may have an interest in. States Parties should further be called upon to publish a press release anytime a decision is made or a settlement reached. These measures are in line with UNCAC Article 56.

**(4) Mandate international organisations to work with States Parties to help ensure that the return of assets pursuant to UNCAC Article 57 and their subsequent use are managed in a transparent and accountable manner in line with Article 9 of the convention.**

The UNCAC Coalition believes it is crucial to ensure that repatriated funds are not wasted or stolen again and are used to benefit a country's people. It therefore calls on States Parties to ensure transparency and accountability with regard to assets returned pursuant to UNCAC Article 57. This is in strict line with UNCAC Article 9.

---

Government Minister of Equatorial Guinea" (October 25, 2011), available at <http://www.justice.gov/opa/pr/2011/October/11-crm-1405.html>

#### **SUMMARY OF KEY RECOMMENDATIONS:**

- States Parties should enact and implement legal frameworks enabling them to take proactive enforcement action in the absence of a request from another country whenever there is credible information that assets located within their jurisdiction may be the proceeds of corrupt activities.
- States Parties should recognize that corruption is a tort that hams society as and organize proper compensation to harmed states by reaffirming that assets return are envisioned by UNCAC article 51 is not limited to actual stolen/embezzled property but includes damages resulting from an act of corruption.
- States Parties should be called upon to inform each other in a timely manner of the existence of any corruption-related legal proceedings or settlements States Parties may have an interest in and to publish a press release anytime a decision is made or a settlement reached.
- States Parties should ensure that the return of assets pursuant to Article 57 and their subsequent use are managed in a transparent and accountable manner.
- States Parties should mandate UNODC and the Stolen Assets Recovery initiative to complete guidelines relating to the above issues.
- States Parties should mandate UNODC and the Stolen Assets Recovery initiative to complete guidelines (including best practices examples) relating to the above issues.

*This paper was prepared by Maud Perdriel-Vaissiere on behalf of the UNCAC Coalition.*